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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 452

MARTIN MARIETTA CORPORATION, *Petitioner*

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Contrary to respondent's assertion, Martin Marietta's request for modification of the consent order was a *bona fide* request based upon allegations of actual and genuine changed conditions. These changed conditions include the fact that, while under the divestiture order Martin Marietta was required

to divest only 59 of its 82 concrete pipe plants, it subsequently abandoned the concrete pipe business altogether, and also disposed of virtually all of its other concrete products businesses. Abandonment of this business had not been anticipated at the time of entry of the divestiture order and, had Martin Marietta maintained the 23 concrete pipe plants not subject to the order, continued operation of the aggregate properties in question would have provided continued opportunity for vertical integration—a matter of specific import in the complaint issued against Martin Marietta (see R. 10-11). On the basis of this and numerous other primary fact assertions of changed conditions, Martin Marietta contended before the Commission that divestiture of the properties in question would actually diminish competition in the affected areas, would result in granting a competitor a monopoly position, and would be wholly contrary to the public interest (see R. 70-87, 99-121, 122-135). Although the Commission denied Martin Marietta's request for a hearing to establish its claim of changed conditions—a hearing to which Martin Marietta believes it was entitled by statute and Commission rule—the court of appeals disclaimed jurisdiction to review either the procedural or the substantive action of the Commission.

We do not believe the *bona fides* of Martin Marietta's motion can be validly disputed, and, in any event, the question before this Court is *not* the substantiality of the changed conditions alleged by Martin Marietta in its motion. The *sole* question is whether the court of appeals had jurisdiction to review the Commission's action in refusing modification—a question whose significance and substantiality respondent

apparently concedes (Resp. Br., p. 6). This question is directly and truly presented, and respondent counsels' claim that the alleged changed conditions were not genuine and substantial is both irrelevant and unavailing. Such a factual "finding" must be made by the Commission—subject to court review—and cannot be supplied by counsels' *post hoc* rationalizations. See *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

Respectfully submitted,

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